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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 520

ALGER HISS,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Alger Hiss, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on December 7, 1950, affirming a judgment of conviction entered by the United States District Court for the Southern District of New York on January 25, 1950.

Opinions Below

There was no opinion in the District Court. The opinion of the Court of Appeals has not yet been officially reported; it is printed at R. 3901-3922.

Jurisdiction

The judgment of the Court of Appeals was entered on December 7, 1950 (R. 3923). A petition for rehearing filed on December 19, 1950 (R. 3925) was denied without opinion on January 3, 1951 (R. 3942-3943). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1), and Rules 37(b) and 45(a) of the Federal Rules of Criminal Procedure.

Questions Presented

1. Whether the Court of Appeals failed to follow the rule of *Weiler* v. *United States* as to the nature of the circumstantial evidence required to corroborate the testimony of a single witness who has sworn to the falsity of an alleged perjurious statement.

2. Whether it was prejudicial error for the District Court to permit the Government to call to the stand a witness who it was known would claim his privilege against self-incrimination and whose right to claim that privilege had been adjudicated.

3. Whether the Court of Appeals failed to follow *Berger* v. *United States* in holding that petitioner was not deprived of a fair trial by the conduct of the prosecutor.

4. Whether the District Court's supplemental instructions to the jury on the day of the jury's verdict were prejudicially erroneous.

Statute Involved

18 U. S. C., Section 1621:

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be admin-

istered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 773."

Statement

Petitioner was indicted on December 15, 1948, for alleged violation of the perjury statute, 18 U. S. C., Section 1621. The indictment is in two counts. The first count alleges that petitioner testified before the grand jury on December 15, 1948, that neither he, nor his wife in his presence, had ever turned over to Whittaker Chambers or to any other unauthorized person any documents of the State Department or of any other Government organization or any copies of such documents, and that such testimony was untrue in that petitioner, while employed in the State Department in or about February and March, 1938, "furnished, delivered and transmitted" to Chambers copies of numerous secret, confidential and restricted documents, writings, notes and other papers, the originals of which had been abstracted from the State Department (R. 2-4).

The second count alleges that petitioner testified before the grand jury on December 15, 1948, that he thought that he could say definitely that he did not see Whittaker Chambers after January 1, 1937, and that such testimony was untrue in that petitioner "did in fact see and converse with the said Mr. Chambers in or about the months of February and March, 1938 . . ." (R. 4-5).

On December 16, 1948, petitioner pleaded not guilty to each count. A trial was held before District Judge Samuel H. Kaufman and a jury beginning May 31, 1949. On July 8, 1949, the jury reported that it was unable to reach a verdict and was discharged.

The first trial was preceded, accompanied and followed by wide publicity, including (during and after the trial) attacks on the trial judge and character witnesses who had appeared for petitioner, and (after the trial) on jurors who had voted for acquittal (R. 94-95, 98-105, 127-130); and some of these jurors were otherwise harassed (R. 113-124). Setting forth these circumstances, petitioner moved for a change of venue (R. 93). The motion was denied (R. 141). Petitioner did not appeal from the denial.

The second trial began on November 17, 1949. The case was submitted to the jury at 3:10 P. M. on January 20, 1950 (R. 3277). After deliberation until 10:45 P. M. on January 20, and from 10 A. M. on January 21, the jury returned a verdict of guilty on both counts of the indictment at 2:47 P. M. on Saturday, January 21, 1950 (R. 3287, 3294). Petitioner was sentenced to five years imprisonment on each count, the sentences to run concurrently (R. 3302).

This case had its origin in a charge of membership in an underground group in the Communist Party made against petitioner by one Whittaker Chambers before the Committee on Un-American Activities of the House of Representatives on August 3, 1948 (R. 598-600). Petitioner denied these charges under oath before the House Committee, and challenged Chambers to repeat his charges where they would not be privileged against suit for libel (R. 1892-1893). Chambers having so repeated these charges, petitioner on September 27, 1948, brought suit for libel against him in the United States District Court for the District of Maryland (R. 2448), and on November 4, 1948, commenced in that suit a pre-trial examination of Chambers (R. 2449).

In his pre-trial examination in the Maryland action, Chambers was asked by petitioner's attorneys to produce any papers that he might have received from petitioner (R. 290). On November 17, after an interval of some days,

Chambers produced four pencil memoranda in petitioner's handwriting (Government's Baltimore Exhibits 1-4, R. 299, 3433-3439) and forty-three typewritten documents all but one of which it was conceded for the purposes of this trial were typed on a Woodstock typewriter once owned by petitioner and his wife (Government's Baltimore Exhibits 5-47, R. 299, 3441-3519).* Each of these pencil memoranda and typewritten documents is either a copy of or excerpt from, or a summary or paraphrase of all or part of, one or more official State Department documents (Government's State Exhibits 1-47, R. 761-767, 790-824, 3535-3629).

Upon the production of Government's Baltimore Exhibits 1-47, petitioner's attorneys on his instructions immediately turned these documents over to the Department of Justice (R. 1895-1896, 2251, 2450-2453).

On December 2, 1948, Chambers delivered to agents of the House Committee two rolls of developed microfilm which he had hidden in a hollowed-out pumpkin (R. 707-714; Government's Exhibits 11, 12, R. 300, 3319), consisting of microphotographs of State Department documents (Government's State Exhibits 48 and 50-55, R. 825-835, 3631-3645). Enlargements of these microphotographs are marked Government's Baltimore Exhibits 48 and 50-55 (R. 301, 3521-3533).

Chambers' production of Government's Baltimore Exhibits 1-47 and Government's Exhibits 11 and 12 resulted in his being recalled,** and petitioner being called, before the grand jury of the Southern District of New York. On the last day of the grand jury's term, December 15, 1948,

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* Government's Baltimore Exhibit 10 (R. 299, 3445) was not typed on the Woodstock (R. 1075).

** On October 14 and 15, 1948, Chambers had testified before the grand jury not only that he had no information or knowledge of any individuals in the employ of the Government furnishing information to any unauthorized sources or being guilty of espionage, but also that in connection with his own activities with the Communist Party he had not obtained any information from any individual (R. 348-352).

petitioner gave the testimony on which the indictment is founded.

The volume and complexity of the record make a summary in this petition impracticable. Only those points necessary as background to a consideration of the questions presented by this petition will be mentioned here. The evidence is more fully analyzed in petitioner's brief in the Court of Appeals, and some misconceptions of the Court of Appeals as to the facts are corrected in the petition for rehearing (R. 3925-3936). In case this Court should want to go further into the evidence, a copy of petitioner's brief in the Court of Appeals is filed as an exhibit with this petition.

The fact theory of the Government's essential case, based entirely on Chambers' testimony, is in outline as follows: Chambers, an underground Communist, was assigned by the Party in 1934 to set up in Washington an underground organization ("apparatus") of Government employees who, under Chambers' leadership, would furnish confidential Government documents and information for transmittal by Chambers to the Russians. Chambers, finding petitioner already a member of another underground organization headed by Harold Ware, brought petitioner over into his own apparatus, pursuant to the instructions of J. Peters, head of the American Communist underground. In the early stages of petitioner's service in Chambers' apparatus, petitioner, then on the staff of the Nye Committee, turned over to Chambers confidential State Department documents which he had obtained in his official capacity. The culmination came with petitioner's dictated acceptance of employment by the State Department in September, 1936. A few months thereafter, early in 1937, Chambers arranged an elaborate clandestine meeting in New York City between petitioner and a Russian, Col. Bykov, Chambers' own superior in the Communist underground. At that meeting Col. Bykov instructed petitioner to obtain confidential

State Department documents, and turn them over to Chambers for the Russians. Following the meeting early in 1937, petitioner (then assistant to Assistant Secretary of State Sayre) carried out these instructions, bringing home State Department documents every week or ten days, turning them over to Chambers who called for them there in the late afternoon or early evening, receiving them back from Chambers late at night, again at petitioner's house, after they had been micro-photographed, and returning them to the State Department the next morning. Later, when Col. Bykov wanted a more constant supply of documents, Chambers arranged to have petitioner bring home State Department documents nightly, and to have copies, extracts or summaries typed by petitioner's wife. At each subsequent visit of Chambers, petitioner turned over to him for microfilming the accumulation of typewritten papers since his last visit, the particular day's haul of original documents, and occasional handwritten memoranda concerning documents which petitioner had been able to see only briefly. Chambers decided to break with the Communist Party late in 1937. He continued the microfilming procedure until his actual break with the Party in mid-April, 1938. Government's Baltimore Exhibits 1-47 and Government's Exhibits 11 and 12 were samples retained by Chambers for some reason which he has not made explicit.

The Government also introduced testimony calculated to prove close association between petitioner and Chambers and their families, continuing into 1938.

The defense, besides attacking Chambers' story on the basis of its internal incredibility and inconsistencies, controverted it by testimony of the petitioner and other evidence. Petitioner's testimony (supplemented by that of others) denied any Communist membership or affiliation, denied any espionage, and denied any close association with Chambers or his family. Petitioner's account was: In December, 1934, or January, 1935, when he was counsel to the Nye Committee, Chambers came to see him, introducing

himself as George Crosley, a free-lance writer doing a series of articles on the munitions investigation. At one of several subsequent meetings at lunch Chambers told petitioner that he was planning to come to Washington for several months to complete his articles on the munitions investigation, and was looking for a place to live with his wife and child; and this conversation eventuated in a sub-lease by petitioner to Chambers of petitioner's apartment at 2831 28th Street, Washington, for the short balance of petitioner's lease, petitioner having moved to a house at 2905 P Street. The Chamberses spent a few days at petitioner's 2905 P Street house before they moved into the 28th Street apartment, Chambers having told petitioner that he and his wife and child had arrived but that the van bringing their effects had been delayed. After a few subsequent meetings, petitioner's last meeting with Chambers took place in the spring of 1936, when petitioner refused Chambers' request for the last of a number of small loans.

Chambers was the sole witness who swore to the falsity of the alleged perjurious statement under the first count of the indictment. The circumstantial evidence proffered by the Government to corroborate Chambers' testimony consisted of the documents, above referred to, alleged by Chambers to have been given him by petitioner, supplemented by evidence bearing on the nature of the documents and on the availability of the related State Department documents to petitioner (among many others).*

Petitioner's position with respect to the supposed corroborative evidence is necessary background for his argument that the Court of Appeals misinterpreted and misapplied the rule of *Weiler* v. *United States* (pp. 16-19,

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* Several of the related State Department documents were not available to petitioner in any relevant sense (see, *e.g.*, petition for rehearing, point 1 (e), R. 3933-3934).

infra). Petitioner's position is that the documentary evidence does not substantiate, but controverts, Chambers' testimony, and that the documents themselves and the supplemental evidence produced by the Government and by petitioner establish reasonable hypotheses, consistent with petitioner's innocence and inconsistent with Chambers' testimony, on which Chambers' possession of the documents is to be accounted for. Since the opinion of the Court of Appeals confines itself largely to the typewritten documents, the discussion here will not go beyond the evidence bearing on those.*

Chambers' testimony was that, in order to provide a steadier flow of documents than was provided by his collection from petitioner at intervals of a week or ten days of the documents brought home by petitioner on the days of Chambers' visits, he arranged to have petitioner bring home original documents "every night, or approximately every night" between the days of Chambers' visits, and to have "some of them typed as nearly verbatim as possible and some of them paraphrased", the typing to be done by petitioner's wife, and that thereafter on his periodic visits: "I received not just the documents from a single day, but typed documents which covered the approximate periods I have mentioned—a week or ten days or so, plus the documents for the single day . . . " (R. 258-259).

Evidence controverting Chambers' story and supporting other reasonable hypotheses was, in part, as follows: Chambers had sources of documents in the State Department including, besides Henry Julian Wadleigh (an admitted source), another source in the Trade Agreements Division where Wadleigh worked, and a source in the Far Eastern Division. Each of the State Department documents underlying the Baltimore typed documents was

* The evidence as to all three types of documents is developed in detail, with record references, in petitioner's brief in the Court of Appeals, pp. 13-52, and some of the misconceptions of the Court of Appeals with respect thereto are corrected in points 1 (d) to 1 (g) of the petition for rehearing, R. 3932-3936.

readily available to Chambers' sources in one or the other of these two offices. One of the underlying State Department documents (Government's State Exhibit 13) was demonstrably never in the office where petitioner worked, and the evidence negatives any rational basis for concluding that he would have gone out of his way to obtain it elsewhere;* therefore the only reasonable conclusion is that Chambers did not obtain Government's Baltimore Exhibit 13 (the typed copy of State Exhibit 13) from petitioner, but obtained State Exhibit 13 from one of his abovementioned sources, and himself typed (or had typed) a copy on the Woodstock typewriter. The Baltimore typed documents contain intrinsic evidence that they were not typed for espionage purposes.** It was conceded for the purposes of this trial (as the Government's expert on questioned documents testified) that the documents were typed on a Woodstock typewriter at one time owned by petitioner and his wife; but there is no intrinsic evidence in the documents as to who did the typing (and the expert's testimony is silent as to this). The Woodstock typewriter was (even on the Government's evidence) given by petitioner and his wife to the Catlett boys, sons of their maid, by mid-April, 1938, at the latest. Chambers could easily have obtained the typewriter from the Catletts' house for a few days without risk of detection. Chambers' possession of Government's Exhibits 11 and 12 (the microfilm) is conclusive evidence that at least as early as January, 1938, he held some microfilm out of his current deliveries to the Russians. All the Baltimore typed documents could have been typed by Chambers in a day or two from microfilm, retained by him, of underlying State Department documents obtained by him from his State Department sources. There is no evidence (other than Chambers' testimony) that

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* See petition for rehearing, point 1 (e), R. 3933-3934.

** For example, Baltimore Exhibit 9, which paraphrases part of State Exhibit 9, omits matter in State Exhibit 9 clearly of greater importance to the Russians than the matter it includes.

the Baltimore type documents were typed currently from State Department originals,* and no other evidence when they were typed. Even assuming that they were (as Chambers alone testified) enclosed in an envelope which he testified he left with his wife's nephew Nathan Levine in May or June, 1938, for safekeeping, Chambers could have typed them at any time up to that date. Chambers' motive in fabricating evidence for future use against petitioner may have been to cover his actual espionage sources in the State Department in the event of discovery, or to protect himself with evidence designed to incriminate an alleged accomplice;** or he may have suffered from the mental ailment of "psychopathic personality" (see p. 14, *infra*), in which case no rational motive need be sought.

No separate point is raised in this petition with regard to the second count of the indictment as a reason for granting the writ, and accordingly the evidence bearing on that count is not dealt with here.*** A holding that the evidence on the first count was insufficient would in itself require reversal of the verdict on the second count under the doctrine of *Stromberg* v. *California*, 283 U. S. 359 (see also *Haupt* v. *United States*, 330 U. S. 631, 641 fn. 1), the District Court having instructed the jury that a finding of guilt on the first count must carry with it a finding of guilt on the second (R. 3275).

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* The underlying State Department documents were all received or prepared in the State Department between January 5 and April 1, 1938.

** In fact Chambers, a confessed spy and perjurer, has escaped all punishment.

*** The evidence is summarized in petitioner's brief in the Court of Appeals, pp. 52-63, 78-79.

As background for this Court's consideration of the question whether the errors of the District Court and misconduct of the prosecutor specified among the reasons advanced for granting the writ were prejudicial or "harmless", we conclude this statement with illustrative mention of evidence bearing on the weakness of the Government's case, and the strength of petitioner's. None of this evidence is mentioned in the opinion of the Court of Appeals, which refers to the "breadth and scope" of Chambers' testimony (R. 3913) without suggestion that there was in the record any basis for doubting its credibility.*

Chambers' testimony before the grand jury on October 14 and 15, 1948 (summarized in a footnote on page 5, *supra*) is proved to be perjurious by Chambers' own possession of Government's Baltimore Exhibits 1-47 and Government's Exhibits 11 and 12, from whatever source he had obtained them, and by the conceded facts of his espionage dealings with Henry Julian Wadleigh (R. 402, 1111-1112). False swearing during Chambers' Communist period was exemplified by his fraudulent application in 1935 for a passport under the name "David Breen", one of a number of his false Communist names (R. 313-318), and continued false swearing thereafter by his application in the fall of 1937 for a job with WPA (R. 260-262, 272-273, 522-529), when according to his own testimony he was preparing to leave the Party and was no longer an atheist (R. 260-261, 380, 530).

Demonstrably false testimony by Chambers at the present trial is illustrated by his story (offered under the second count of the indictment) of an alleged trip to Peterboro, New Hampshire, in August, 1937, with petitioner and petitioner's wife,—a story directly inconsistent with Chambers' testimony before the House Committee that he had never stayed overnight on any automobile trip with the Hisses (R. 455). The story was conclusively disproved by independent evidence: The manager of Bleak

* The credibility of Chambers' testimony was essential to the proof under the second count as well as that under the first count.

House, an inn in Peterboro where Chambers testified he had spent the night with the Hisses, testified that she had never seen him or them; she produced the guest book for August, 1937, in which she testified every guest registered, and which showed no entry that could represent Chambers or the Hisses under their own or any other names (R. 1673, 1675, 1678).

Inconsistency in Chambers' testimony at the present trial and earlier, and changes to avoid obstacles, are illustrated in his testimony regarding petitioner's 30th Street house.* Before the House Committee in August, 1948, Chambers testified that he was sure that he had stayed in that house overnight (R. 545). In his pre-trial examination in the Maryland action in November, 1948, he testified that he might have stayed there as many as ten times, sleeping in one of three bedrooms (R. 490-491). In February, 1949, a meeting was arranged by the FBI between Chambers and the Hisses' two former maids, at which Chambers concededly questioned the maids about the interior of petitioner's houses. Having been told by one of the maids that there were only two bedrooms in the 30th Street house, one the Hisses' and the other their son's (R. 1571), Chambers testified at this trial: " . . . I have no clear recollection of spending the night there . . . I have no vague recollection either" (R. 490.)

Chambers' story regarding "Col. Bykov", central to his entire story of petitioner's alleged espionage, was met with evidence that in 1945 Chambers had told the FBI a wholly inconsistent story about the Russian known to him as Bykov (R. 559).**

The inherent incredibility of Chambers' story regarding his alleged espionage relations with petitioner, including visits to petitioner's house for a period of more than

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* Petitioner occupied the 30th Street house from July 1, 1936, to December 29, 1937.

** This and other inconsistencies regarding Chambers' Bykov story are developed in detail in petitioner's brief in the Court of Appeals, pp. 68-71.

a year, at intervals of a week or ten days, in the afternoon or early evening to pick up stolen State Department documents, and again late the same night or in the early hours of the next morning to return the documents, accompanied by frequent social contacts between their two families, was sharpened by evidence as to how Chambers actually acted in his conceded espionage relations with Wadleigh, where papers in briefcases were handed over and returned at street corners and there were no social relations (R. 404, 652, 1111, 1113, 1137).

Petitioner introduced also undisputed expert psychiatric testimony in explanation of Chambers' false accusations and his fabrication of purported evidence to support those accusations. Two qualified experts * testified that Chambers suffered from the mental ailment of "psychopathic personality"—recognized by the New York State Department of Mental Hygiene—of the type characterized by amoral, asocial and delinquent behavior (*e.g.*, R. 2550-2553, 2769, 2812, 2949), with a personal history of theft, pathological lying, deceiving, bizarre or eccentric behavior, false accusations, a disposition to smear, degrade and destroy, abnormal emotionality, instability of attachments, and paranoid ideas (*e.g.*, R. 2563-2579, 2818-2826).** The testimony of both experts was based on a hypothetical question (R. 2526-2549) the larger part of which was concededly a summary of Chambers' own testimony (R. 2870) and on certain of Chambers' writings and translations.***

Petitioner introduced also evidence of his own reputation through unimpeachable witnesses, many of whom testified also on factual issues, and evidence that petitioner's

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* Carl A. L. Binger, M.D., a psychiatrist, and Henry A. Murray, M.D., a psychologist with psychiatric experience.

** A more detailed statement of the testimony of the psychiatric experts, with further record references, appears at pages 49-50 and 73-74 of petitioner's brief in the Court of Appeals.

*** Dr. Binger's testimony was based also on his observation of Chambers on the witness stand (R. 2524-2525, 2549-2550).

actual attitudes and actions had been always in his country's interest and, where that diverged from Russia's, against Russia's.

Specification of Errors To Be Urged

The Court of Appeals erred:

1. In affirming the denial by the District Court of petitioner's motion for judgment of acquittal on the first count of the indictment made on the ground that the evidence was insufficient to justify submission to the jury under the law applicable in perjury cases.

2. In failing to hold that it was prejudicial error for the District Court to permit the Government to call to the stand a witness, William Rosen, who it was known would claim his privilege against self-incrimination and whose right to claim that privilege had been adjudicated.

3. In holding that petitioner was not deprived of a fair trial by the conduct of the prosecutor.

4. In failing to hold that the District Court committed prejudicial error in supplemental instructions to the jury on the day of the jury's verdict.

NOTE: In the event that the writ is granted, petitioner would wish to reserve the right to argue, in presenting the case as a whole, additional errors of the Court of Appeals relating to the following matters: the construction of the second count of the indictment; the sufficiency of the evidence under the second count; the admission of the testimony of the witnesses Inslerman and Webb; the denial of petitioner's motions to strike the testimony of the witnesses

Massing, Murray and Dulles; the undue weighting against petitioner of the District Court's initial instructions to the jury; and the denial of petitioner's motions to dismiss the indictment and to arrest judgment made on the ground that petitioner's testimony before the grand jury on which the indictment is based was elicited not for the purpose of seeking information but with the intent of evading the bar of the Statute of Limitations by indicting petitioner for perjury and prosecuting him in that guise for an alleged crime, espionage, barred by the Statute.

Reasons for Granting the Writ

I

The Court of Appeals, in holding as to the first count of the indictment that "there was independent evidence sufficient as a matter of law, if believed and so considered by the jury, to substantiate the testimony" of the sole witness under that count, has decided an important question of Federal criminal law in a way probably in conflict with the decision of this Court in *Weiler* v. *United States*.

Petitioner moved in the District Court for judgment of acquittal on the ground that the evidence was insufficient to justify submission of the case to the jury under the law applicable in perjury cases (R. 3089; see also R. 1310, 1314-1319). The motion was denied (R. 3089; see also R. 1320). The Court of Appeals affirmed,—as to the first count on the ground stated above (R. 3916).

This Court stated in *Weiler* v. *United States*, 323 U. S. 606:

> "The court below held, and the government argues here, that it is solely the function of the judge finally to determine whether a single witness and sufficient corroborative evidence have been presented to sustain a conviction. Two elements must enter into a deter-

mination that corroborative evidence is sufficient: (1) that the evidence, if true, substantiates the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement; (2) that the corroborative evidence is trustworthy. To resolve this *latter* question is to determine the credibility of the corroborative testimony, a function which belongs exclusively to the jury." (323 U. S. at 610; italics added)

Where, as here, corroboration is wholly by circumstantial evidence, *Weiler* requires, it is believed, that the circumstantial evidence as a whole must be such as to exclude any reasonable hypotheses consistent with the defendant's innocence; the legal adequacy of the circumstantial evidence being a matter for the Court to determine, its trustworthiness (if in character it is sufficient) for the jury. This interpretation is supported by the applicable dictionary definition of the verb "substantiate": "To establish the existence or truth of by proof or competent evidence; to verify; as, to *substantiate* a charge" (Webster's New International Dictionary, 2d Ed., 2514), and by analysis of the four state court cases cited (in a footnote) immediately following the language quoted above from the *Weiler* opinion.* And in an earlier case the Court of Appeals for the Second Circuit has itself applied "the general rule" that the corroborating evidence must as a matter of law be "independent evidence inconsistent with the innocence of the defendant" (*United States* v. *Isaacson*, 59 F. 2d 966; see also *United States* v. *Buckner*, 118 F. 2d 468, 469).

In the present case the Court of Appeals, citing *Weiler*, has stated a rule differing wholly from the rule of *Weiler* and *Isaacson*:

"There must be either two witnesses who testify that the accused violated his oath, or one witness to that

* See, *e.g.*, *State* v. *Hill*, 223 N. C. 711, 28 S. E. 2d 100:

". . . conviction may be had upon the testimony of one witness, corroborated by circumstances inconsistent with defendant's innocence and directly tending to corroborate the accusing witness." (28 S. E. 2d at 103)

> and corroboration by other evidence which is believed by the jury, *and is found by it to substantiate* the testimony of the one witness." (R. 3903; italics added) *

Applying the rule so stated, the Court of Appeals, not considering the circumstantial evidence as a whole, has sanctioned the jury's reaching a conclusion of guilt on the basis of inferences of fact which the Court thinks the jury may have drawn from parts of the evidence, without regard to the existence of other reasonable hypotheses of fact clearly consistent with petitioner's innocence. Thus the Court says "It was, of course, possible" that the Baltimore typed documents "were typed later . . . from micro-filmed copies" of State Department documents "stored away for this purpose" (petitioner having argued from the evidence that the probability was that Chambers had done so); but the opinion continues: "That, however, was properly a question for the jury, not for this court" (R. 3915).

The view of the Court of Appeals, conflicting with the *Weiler* rule as we understand it, is summed up in the sentence with which the Court concludes its discussion of evidence under the first count:

> "The foregoing is an attempt not to summarize the mass of evidence introduced at the trial below, but only to show, as we think it does, that there was independent evidence sufficient as a matter of law, if believed *and so considered by the jury*, to substantiate the testimony of Mr. Chambers in compliance with the rule in perjury cases as to both counts." (R. 3916; italics added)

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* Following this, the opinion proceeds, citing *Isaacson* and *Buckner:*

> "This corroboration of the testimony of a single witness should be such that it supplies independent proof of facts inconsistent with the innocence of the accused." (R. 3903)

But it is clear from the opinion as a whole that the Court of Appeals does not follow the rule of *Isaacson* and *Buckner*, and that this sentence, in the context of the whole opinion, means no more than that the jury may find the fact of guilt (inconsistent with innocence) by inference from circumstantial evidence, without regard to other possible reasonable inferences.

Thus the Court of Appeals abdicates to the jury the function, reserved to the court by *Weiler,* of determining the legal sufficiency of the circumstantial evidence to substantiate the testimony of the single witness.

In *Weiler* itself, the Government sought unsuccessfully to induce this Court to abandon the two-witness rule in perjury cases. If the interpretation of one branch of the *Weiler* rule adopted by the Court of Appeals in this case is permitted to stand, much of what the Government then sought will now have been accomplished, and circumstantial evidence offered in corroboration of a single witness will no longer have to approach the status of a second witness. Thus there is presented a question of first importance which, we submit, this Court should determine.

II

The Court of Appeals, in failing to hold that it was prejudicial error for the District Court to permit the Government to call to the stand a witness, William Rosen, who it was known would claim his privilege against self-incrimination, and whose right to claim that privilege had been adjudicated, has decided an important question of Federal law which has not been, but should be, settled by this Court.

Testifying regarding the earlier years of his alleged Communist association with petitioner, Chambers said that petitioner had told him that he (petitioner) had turned over his old Ford roadster "to the open Communist Party for the use of some poor organizer" (R. 247). Petitioner denied this story (R. 1867). He testified that, in connection with the 28th Street sub-lease, Chambers had spoken to him about wanting a car and he had told Chambers that, when he acquired a new car he was contemplating buying, Chambers could have the old Ford, worth $25 or $30; that he acquired a new Plymouth in August, 1935;

that he then, in accordance with his earlier promise, turned the Ford over to Chambers, who kept it for a few months; and that in the following spring (before petitioner moved from his P Street house on June 15, 1936) Chambers took final possession of the Ford with the certificate of title, and petitioner never saw the Ford thereafter (*e.g.*, R. 1860, 1863-1865, 1869). Chambers admitted that he had used the Ford, but denied that it had been given to him (R. 246).

The certificate of title in petitioner's name (Government's Exhibit 49, R. 773, 3377) shows an assignment of title by petitioner to Cherner Motor Company (the largest Ford agency in Washington), a reassignment by Cherner Motor Company to one William Rosen, and an application for new certificate of title by William Rosen, all notarized on July 23, 1936. Petitioner testified that he had no recollection of executing the assignment of title, but that, since it was verified before a fellow-attorney in the Solicitor General's office, he concluded that it must have been brought to him for execution at his office during business hours (*e.g.*, R. 1865-1866, 2030-2032); that, apart from signing the assignment of title, he had never had any dealings with Cherner Motor Company (R. 1881); and that he had never seen William Rosen (R. 1867).

William Rosen, questioned before a grand jury of the Southern District of New York as to any connection he may have had with the above matters, claimed the privilege against self-incrimination, and his claim was upheld (*United States* v. *Rosen*, 174 F. 2d 187, 2 Cir., certiorari denied 338 U. S. 851).

Defense counsel, knowing that the Government proposed to call Rosen as a witness, informed the Court in chambers that Rosen's counsel had said that Rosen "would claim the privilege with respect to any questions pertaining to his membership in the Communist Party and with respect to any questions pertaining to his transaction involving the Ford car which at one time belonged to Mr. Hiss" (R. 859),

and objected to Rosen's appearing as a witness (R. 860). The prosecutor accepted the reported statement of Rosen's counsel as a correct statement of Rosen's intention (R. 860).* Asked by the Court whether, in view of this, he wished to call Rosen, the prosecutor said he did (R. 860). Over petitioner's renewed objection (R. 922), Rosen was permitted to take the stand. Asked whether in July, 1936, he was connected with the Communist Party, Rosen claimed his privilege. Thereupon the prosecutor said: "I don't know whether the jury heard this. Will you please read it, Mr. Reporter" (R. 922-923). There followed a series of questions concerning the Ford car similar to the questions that the witness had refused to answer before the grand jury (R. 923). Six more times Rosen claimed his privilege against self-incrimination in the presence of the jury. The Court sustained the claim, and instructed the jury that they were to draw no inference unfavorable to the defendant (R. 924-925; see also the Court's charge, R. 3267).

In summation the prosecutor, disregarding the Court's instructions, in effect asked the jury to conclude from Rosen's claim of privilege that Rosen was a Communist,** and on that basis asserted that Chambers' story (of petitioner's giving his car to the Communist Party) was corroborated (R. 3228).

The opinion of the Court of Appeals, treating the error as if all that is involved is misconduct of the prosecutor and not also the action of the District Court, states:

> "... We do not now say that such an abuse might not sometime occur so as to require reversal, but we find no such abuse occurred below. Cf. *Weinbaum* v. *United States*, 9 Cir. F. 2d ; dec'd Sept. 19, 1950; *People* v. *Kynette*, 15 Cal. 2d 731, 104 P. 2d 794, cert. denied 312 U. S. 703 ..." (R. 3920).

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* For that reason, the defense suggestion that, if there were any doubt, the Court call Rosen and inquire, was not adopted (R. 860).

** There is no evidence in the record, even in Chambers' testimony, that Rosen is or ever was a Communist.

There could be no case, we submit, of a prosecutor's calling such a witness and a court's permitting him to take the stand which could contain any element of abuse or error not present here: (1) the prosecutor admitted in the conference in chambers, and the District Court was thus clearly informed, that Rosen, if called, would claim his privilege; (2) Rosen's right to do so had already been adjudicated; (3) when Rosen took the stand and did claim the privilege, the prosecutor made sure that the jury was aware of it by having the court reporter read the answer; (4) Rosen testified to nothing relevant to the prosecution's case; (5) the prosecutor flouted the court's ruling that no inference was to be drawn by the jury from Rosen's claim of privilege by asking the jury to draw the inference that he was a Communist.

Specifically, the *Weinbaum* and *Kynette* cases, cited by the Court of Appeals, are clearly distinguishable. In *Weinbaum*, as the opinion of the Court of Appeals for the Ninth Circuit points out, when the witness in question was being examined "it was by no means certain that he would adhere to his claim of privilege." * In *Kynette* the Court pointed out, first, that the witnesses might have changed their minds about testifying and, second, that the trial court could not tell in advance whether their claim of privilege would be justified (see 104 P. 2d 794 at 802-3).

The question here presented affects the fundamental rights of all litigants and has special significance in criminal cases. In such cases the right of a defendant to be confronted by the witnesses against him implies a right to subject their testimony to cross-examination. That right is destroyed when, under a pretense that he is being called to testify, a witness is called for no purpose but to ask him questions which it is known he will refuse to answer

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* Officially reported 184 F. 2d 330.

on the ground of self-incrimination. In such circumstances the jury must conclude that the witness has been involved in some wrongdoing relating to the subject-matter of the case. The further inference that the defendant was involved in such wrongdoing is strongly suggested, if not compelled, by the circumstance that the witness was called by the Government ostensibly to testify against the defendant. Yet the testimony of the witness, had he been willing to testify, "might have entirely exonerated the defendant." (*Beach* v. *United States*, 46 Fed. 754, 755; opinion by Mr. Justice Field, on circuit).

There is especially acute prejudice in a case such as this, based on a charge against the defendant of Communist conspiracy, where a question as to which the witness claims his privilege involves his own membership in the Communist Party. In this and the other circumstances of the present case (see pp. 25-26, *infra*), the error of the District Court cannot be deemed "harmless" (*Kotteakos* v. *United States*, 328 U. S. 750).

In an earlier case, *United States* v. *5 Cases, Etc.*, 179 F. 2d 519, 523 (certiorari denied 339 U. S. 739), the Court of Appeals for the Second Circuit had itself recognized the importance of the question, and the degree of prejudice to be anticipated, by stating in a considered dictum that it might be "ground for reversal if the party who called a witness connected with a challenged transaction knew, or had reasonable cause to know, before putting the witness on the stand that he would claim his privilege," * citing two cases in the Texas Court of Criminal Appeals. There are, so far as we are aware, no cases to the contrary.

The ruling of the District Court in this case presents, we submit, an important question of Federal law which has not been, but should be, settled by this Court.

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* Referred to in the present opinion at R. 3920. In *5 Cases*, the Court of Appeals held that there was no such knowledge or reasonable cause to know.

III

The Court of Appeals, in holding that petitioner was not deprived of a fair trial by the conduct of the prosecutor, has decided an important question of Federal criminal law in a way probably in conflict with the decision of this Court in *Berger* v. *United States*.

The Court of Appeals held that there was nothing in the "general conduct" of the prosecutor which could justify reversal (R. 3922), referring back to what it had said with respect to the calling of the witness Rosen:

> " . . . Where a prosecutor is charged with conduct so prejudicial as to amount to reversible error, the charge should be made good by showing a successful effort to influence the jury against a defendant by some means clearly indefensible as a matter of law. It is not enough if there are no more than minor lapses through a long trial. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 239-40. Cf. *United States* v. *Buckner*, 2 Cir., 108 F. 2d 921, 928, cert. denied 309 U. S. 669." (R. 3920)

Especially in requiring that a defendant show "a successful effort to influence the jury", this holding goes beyond anything that has been held, so far as we are aware, either by this Court or by any Court of Appeals; and, on the facts of this case, the holding conflicts with the holding of this Court in *Berger* v. *United States*, 295 U. S. 78.

The reference in the opinion of the Court of Appeals to "no more than minor lapses through a long trial" paraphrases language of this Court (*United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 240) inapplicable in the circumstances of this case and to the actual conduct of the prosecutor here.

The holding of the Court of Appeals, applied in the circumstances of this case and to the facts disclosed in this

record, appears to be precedent for denying to any defendant in a long case relief against the conduct of a prosecutor, however prejudicial, and for conferring on the prosecutor license to act as he will.

In determining whether the conduct of the prosecutor was so prejudicial as to have deprived petitioner of a fair trial and called for reversal, three factors must be considered: (1) the weakness of the Government's case; (2) the circumstances in which the case was tried; and (3) the character and extent of the prosecutor's misconduct.

We have discussed illustratively evidence showing that the Government's case was weak (pp. 9-15, *supra*). The failure of the jury in the first trial to reach a verdict, and the long deliberations and doubts of the jury in this trial (R. 3277-3291, 3294), lead to the same conclusion.* Petitioner was thus in the position of the defendant in *Berger*, and in a position different from that of the defendants in *Socony-Vacuum*.

There was in this case a combination of circumstances emphasizing the necessity of care lest petitioner's interests be prejudiced.

This case began in widely publicized Congressional hearings and continued through a widely publicized first trial, followed by abuse of jurors who had there voted for acquittal. No juror in the second trial, however responsible in his intentions, could be unaware of his public position and the risk of abuse if he took and held a position favorable to petitioner.

Since the charges included Communist Party membership and activity, the common knowledge that Communist doctrine calls for denial of Party membership and for the lie as an instrument of strategy placed petitioner under a grave handicap; and that handicap was accentuated by the popular feeling of the times.

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* See *People* v. *Esposito*, 224 N. Y. 370, 372, 121 N. E. 344, 344-5.

The range and complexity of the issues made it exceptionally difficult for the jury to exercise their function, and the extreme length of the trial added to that difficulty. Far from limiting the effect of the prosecutor's prejudicial conduct, these factors gave sharp effectiveness to prejudice generally, and especially to the concentrated prejudice in the prosecutor's summation.

The record shows deliberate and persistent prejudicial conduct on the prosecutor's part from his opening through the trial and his summation, of which the Rosen matter (already discussed) is only one example. It is impossible to detail in this petition the many instances of the prosecutor's misconduct. We proceed, therefore, to further illustrative discussion.

References to the grand jury

In opening and summation, the prosecutor referred to the grand jury in such a way as to invite the jury to believe that the questions for their decision had already once been decided against petitioner, and to invite them to follow that lead,—detailing the length and character of the grand jury's deliberations (R. 173, 3253-3254) and referring to it as "a body like yours" (R. 3219; see also R. 177). Thus at the conclusion of his opening statement:

> "But when the chips were down in December in the grand jury, when the grand jury, a body like yourself—twice as many—called him [Chambers] and called Mr. Hiss, first one, then the other, first one, then the other—where was the truth here? Where was the truth? Did you or didn't you?
>
> And they indicted Hiss." (R. 177)

The vitally prejudicial effect of such argument has been judicially recognized (*People* v. *McMahon*, 244 Ill. 45, 91 N. E. 104; *People* v. *Hale*, 82 Cal. App. 2d 827, 187 P. 2d 121).

Reference to lie-detector test

Reading into the record an excerpt from the House Committee hearings in which Congressman Nixon, telling petitioner that Chambers had said he would take a lie-detector test, had asked petitioner whether he would be willing to take one and petitioner had stated his reasons for doubting the validity of such tests (R. 2211-2212), the prosecutor cross-examined petitioner on this subject. Petitioner testified that he had not refused to take such a test but had written the Committee a letter saying that he would like to consider the matter and consult people, and that thereafter the Committee had dropped the matter. The cross-examination concluded:

> "Q. Well in any event you did not take the test? A. No; they dropped it, as I say.
> Q. Well, you didn't come forward and insist upon it? A. No, I did not." (R. 2212)

Petitioner's doubts of the scientific validity of lie-detector tests are, so far as we know, shared by the courts of every jurisdiction that has considered the question (see III Wigmore, 3d Ed., p. 645). Yet the prosecutor suggested to a jury ignorant of the scientific status of such a test that petitioner, if innocent, would have insisted on taking it.

Charges that petitioner and his counsel were following the Party line

In his opening the prosecutor, referring to petitioner's libel action against Chambers, and purporting to paraphrase Chambers, said: " . . . when that lawsuit was started then he saw the Communist Party at work . . . " (R. 177). No evidence was produced that Chambers ever thought or said so.

In summation the prosecutor characterized petitioner's denials before the House Committee and the grand jury as

"standard CP practice" (R. 3240) and, referring to criticism by defense counsel of the FBI,* continued:

> "... This is the open season on the FBI; everybody is taking potshots at them. It is the party line to do it. It is the party line." (R. 3255)

These statements were open assertions wholly without support (even in Chambers' testimony) that petitioner is now a Communist Party member, and that petitioner's counsel in the Maryland libel suit and in this trial were cooperating with him in Communist tactics.

Charges that petitioner and his counsel had fabricated the defense

The prosecutor made wholly unfounded charges that petitioner and his counsel had fabricated the defense, of which only one can be discussed here by way of example.

The defense discovered, between the first trial and the second, that Chambers had in 1935 obtained a false passport under the assumed name "David Breen". One of petitioner's counsel having received a tip to this effect (R. 2062-2064), without specification of the name that Chambers had used or the date of the passport, counsel wrote the State Department inquiring whether Chambers had secured a passport during the period 1930-1939 under his real name or any of a number of assumed names (R. 160-161). Following further correspondence, the defense obtained a subpoena, opposed by the Government, and Chambers' false "David Breen" passport application was produced and introduced at the trial (R. 141-161, 304, 306).

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* See counsel's temperate criticism in summation (R. 3123-3124) regarding an incident involving the FBI and Mrs. Norma B. Brown (R. 1652-1654). Another instance of FBI conduct clearly subject to criticism was their permitting Chambers, in advance of his testimony, to interrogate two former maids of the Hisses regarding the interior of petitioner's houses (see p. 13, *supra*).

With no substantial support even in Chambers' testimony,* the prosecutor persistently insinuated, on petitioner's cross-examination, that petitioner had known all along about the passport and had himself informed his counsel of it, and that his testimony as to his counsel having received after the first trial a tip about its existence was a fabrication (R. 2061-2065, 2125). In the prosecutor's summation the charge of fabrication was repeated (R. 3240, 3250), with a specific charge that counsel's letter of inquiry to the State Department was a deliberately fabricated cover for petitioner's false testimony.

Reference to seriously damaging matter unsupported by or contrary to the record

The prosecutor's summation was replete with statements contrary to or unsupported by the record on matters seriously damaging to petitioner. We discuss one by way of example.

The expert psychiatric testimony regarding Chambers' mental ailment (p. 14, *supra*) was of fundamental importance to the defense, as the District Court recognized in admitting it (R. 2517). The Government produced no expert testimony to the contrary.

In summation, the prosecutor said: "I think you can assume that in the preparation of my cross-examination I had competent assistants" (R. 3218), and later " . . . There was no suspicion of anything wrong with Mr. Chambers' mind at all" (R. 3218), and again:

> "If I thought there was a serious question, a really serious question of the mental condition of Mr. Cham-

* Chambers testified that he did not recall having told petitioner about the passport (R. 249), that he did not go to Europe, and that the passport was never used (R. 251). He testified further that he had discussed with petitioner in 1935 a contemplated trip "to England for work in the Soviet apparatus" (R. 249, 313), but it was conceded that he told this story for the first time at the second trial (R. 313), though the FBI knew of the passport application before the first trial (Defendant's Exhibit 5xS, R. 2438, 3869).

bers, I suggest to you that the Government could afford competent psychiatrists. But I did not call any. I do not think the question attained that dignity" (R. 3219).

Thus the prosecutor, going directly contrary to the only evidence in the record, asserted that there was no serious question, not even a suspicion, as to Chambers' mental condition, and, going wholly outside the record, told the jury that he himself had consulted experts (his "competent assistants") and, as clearly as if he had put it in words, that the opinion he expressed was the opinion of those experts.

Improper attacks on defense witnesses

The prosecutor subjected defense witnesses to improper attack and innuendo. For example:

Ambassador Philip C. Jessup was cross-examined with the clear intent of conveying by innuendo doubts as to his loyalty and a suspicion of some improper relation with the Russians (R. 1158-1160). For example, he was asked whether he knew an unidentified person named Jacob Aranoff (whose Russian name would be sufficient to convey the intended implication to the jury) despite the fact that on his deposition on the first trial he had denied knowing Aranoff (R. 1158).

By persistently purporting to misunderstand the testimony of Clark M. Eichelberger, the prosecutor attempted to attach a Communist tinge to clearly non-Communist organizations in which Eichelberger had been active (R. 2959-2960). Thus by referring to William Allen White's Committee to Defend America by Aiding the Allies as "that committee to keep us out of war", the prosecutor sought to convey to the jury the idea that Eichelberger's activities (and petitioner's with him) were favorable to the Russian-German position during the period of the Hitler-Stalin Pact, as the activities of American Communists at the time had been.

Testimony of Edith Murray in rebuttal

The only witness other than Chambers and his wife who testified to any disputed meeting at any time between either of the Chamberses and either of the Hisses was Edith Murray, a former maid of the Chamberses, who was produced on the Government's rebuttal case, on the last day of the trial, to testify that she had seen petitioner's wife on a few occasions, and petitioner once, at the Chamberses' residence in Baltimore in the fall of 1935 or the spring of 1936 (R. 3024-3027).

On cross-examination, Mrs. Murray testified that she had been brought from Maryland to the courthouse in New York by the FBI on November 17, 1949, the first day of the trial, and, in the hall outside the courtroom, had identified petitioner and his wife, apparently as they came out of the elevator (R. 3032-3033), and, further, that before that event she had been shown pictures of petitioner and his wife by the FBI * and had been told by the FBI, when she came to New York, "to see if [she] could recognize them" (R. 3032-3033).**

Mrs. Murray's testimony was suspect not only because of the steps (plainly contrary to proper procedure for identification) which led to her identification of petitioner and his wife. Cross-examination developed also that in 1942 she had had a nervous breakdown and had been under a doctor's care for over a year (R. 3043-3046), and developed the circumstances of a visit to the Chamberses before November 17, 1949 (R. 3036, 3038-3042), during which the Chamberses could have supplied by suggestion such circumstantial detail as gave color to her testimony.

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* Mrs. Murray testified that when she had first been shown a picture of petitioner's wife she "thought maybe it was an actress or something" (R. 3032, 3046), and that she had at first been unable to identify petitioner's picture (R. 3051, 3053).

** At R. 3056, Mrs. Murray testified:

"... all they wanted to do was bring me up here to see if I could recognize the woman that was in the picture and the man on the picture."

The District Court, denying petitioner's motion to strike Mrs. Murray's testimony in rebuttal, stated that "it might more properly have been offered in the direct case" (R. 3177-3178). In view of Mrs. Murray's presence in the courthouse on the first day of the trial, it is clear that the prosecutor deliberately postponed her appearance to the last day of the trial. In the absence of any excuse for the delay, it can only be concluded that he intended the actual results: first, to deprive the defense of opportunity to controvert and impeach Mrs. Murray's testimony; second, to give to that testimony a dramatic impact and effect which would conceal its inherent weakness.

Unsupported argument identifying petitioner's wife as the typist of the Baltimore typed documents

In summation, the prosecutor invited the jury to conclude from typing errors common to the Baltimore typed documents and standards typed by petitioner's wife that she was the typist of the Baltimore documents (R. 3258).

During the trial the Government produced as a witness Ramos C. Feehan, an FBI expert on questioned documents.* Using four standards concededly typed on the Hisses' Woodstock typewriter in 1937 and earlier (three by petitioner's wife and one by her sister) and comparing these with the Baltimore typed documents, Feehan testified to his conclusion "that the same machine was used to type Baltimore Exhibits 5 through 9 and 11 through 47 that was used to type the four known standards" (R. 1074, 1080-1081, 1106).** Feehan was not asked for an opinion as to the identity of the *typist* of the Baltimore typed documents, and he gave no opinion on that subject.

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* Feehan's testimony regarding the Baltimore typed documents appears at R. 1074-1082, 1096-1102 and 1105-1106.

** Feehan was not cross-examined as to this conclusion; its validity was in fact conceded for the purposes of this trial, counsel for petitioner stating to the jury in his opening (R. 201) and in his summation (R. 3145, 3162) that experts consulted by the defense had held the same opinion.

No evidence was adduced that it is scientifically possible ever to identify a typist by comparing typing errors with errors in standards of comparison. Assuming that that is scientifically possible in some instances, no evidence was adduced as to what errors would be significant. Thus the prosecutor invited the jury, who "manifestly know nothing about it", to reach a conclusion by "indulging in mere guesswork".* Beyond this, the prosecutor's failure to elicit an opinion from his own witness, Feehan, as to the identity of the typist of the Baltimore documents is clear ground for concluding that Feehan had told the prosecutor that there was no scientific basis for identifying the typist as petitioner's wife.

Nor is this all. There are typing errors common to the Baltimore typed documents and other documents in evidence, letters typed by Chambers (Defendant's Exhibits W to W-7, R. 478, 3707) and a typed memorandum of a conversation of March 20, 1945, at Chambers' farm at Westminster between him and Raymond Murphy, a State Department security officer (part of Government's Exhibit 17, R. 606, 3323).** Thus (even apart from the scientific question) the prosecutor must have known that his argument for identifying petitioner's wife as the typist on the basis of common typing errors was invalid, since the same argument could equally well have identified others.

The prosecutor thus asked the jury to reach for themselves a conclusion demonstrated by his own expert witness to be scientifically unsupportable and demonstrated by the documentary evidence in the case to be logically unsupportable.

The probability of prejudice to petitioner is also plain. Having retired at 3:10 P. M. on January 20, the jury at 5:00 requested, among other things, "Mrs. Hiss's letters written on typewriter", "Papers in evidence 5 to 47, etc.",

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* *United States* v. *Lumbra*, 63 F. 2d 796, 2 Cir., aff'd 290 U. S. 551, dealing with a question of expert medical opinion.

** Examples of such errors are detailed in petitioner's brief in the Court of Appeals, pp. 42-43.

and "FBI sample typing";* the request was repeated in substantially the same terms at 5:30; and these papers, with other material requested, were delivered to the jury early in the evening (R. 3277, 3278, 3280, 3282-3283). It is thus clear that the jury accepted the prosecutor's invitation to the point of making the suggested comparison. If any of the jurors went further and reached the invited conclusion, this would logically have determined the outcome of the case for those jurors.

Except as to the calling of the witness Rosen and the rebuttal testimony of the witness Murray, petitioner's counsel took no objection on the record with respect to the matters here discussed.** The damage done by the question or argument was incurable, and objection would only have aggravated it; the number of instances, especially in the summation, rendered effective objection impossible and any attempt at objection harmful. Misconduct of the kind that existed here may be noticed without objection (see *United States* v. *Atkinson*, 297 U. S. 157, 160; *Skuy* v. *United States*, 261 Fed. 316, 320-1, 8 Cir.); and the Court of Appeals did not put its decision on the ground of lack of objection.

We return now to the grounds on which the Court of Appeals disposed of petitioner's claim that he had been

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* FBI Agent McCool had typed in court on the Woodstock typewriter (R. 3019). The purpose of his doing so was to show that the typewriter could be used (R. 3253). Presumably the jury requested the material typed by him for comparison with the other typed documents.

** Petitioner moved for a new trial, after verdict, on these grounds among others (R. 3297-3298). At the appropriate time petitioner requested the Court to charge that the jury were "not to consider any assumptions or implications contained in questions asked by the Government's counsel of defendant's witnesses, including character witnesses" (Request No. 43, R. 3193); this request was endorsed by the Court "Will be covered" (*ibid.*), but the subject-matter was not included in the instructions given.

deprived of a fair trial by the conduct of the prosecutor (see quotation at page 24, *supra*).

As the foregoing illustrative discussion has shown, the prosecutor was guilty not of "minor lapses", but of seriously prejudicial and deliberate misconduct. That misconduct did not appear, as the opinion might be read to imply, in the form of isolated instances, but was "pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential" (*Berger* v. *United States, supra,* 295 U. S. at 89). As we have noted earlier, the fact that this was "a long trial"—and a complex trial—only added to the prejudicial effect.

As to the especially prejudicial effect of the prosecutor's summation, two things should be added. That effect was sharpened by the fact that his summation came on the day the case was submitted to the jury; the reasoned and temperate summation in petitioner's behalf, delivered the day before, could not protect him adequately against the later prejudicial attack. Second, the excuse often relied on by prosecutors, that their conduct was provoked by conduct of counsel for the defense (see, *e.g., United States* v. *Socony-Vacuum Oil Co., supra,* 310 U. S. at 241-2), was wholly absent in this case.

There remains the statement by the Court of Appeals that a defendant must make good a charge of prejudicial conduct by the prosecutor "by showing a successful effort to influence the jury",—a test which comes close to meaning, if it does not actually mean, that no defendant can in practice ever show prejudice by any misconduct of a prosecutor. Where, as here, the prosecutor's intent to prejudice is plain, and actual prejudice "highly probable" (*Berger* v. *United States, supra,* 295 U. S. at 89), we submit that no more need be shown.

It is, we submit, essential for the proper administration of Federal criminal law that this Court reassert the principles laid down in *Berger,* and clarify the relation to those principles of the language of this Court in *Socony-Vacuum* paraphrased in the opinion of the Court of Appeals.

IV

The Court of Appeals, in failing to hold that the District Court committed prejudicial error in supplemental instructions to the jury on the day of the jury's verdict, has decided an important question of Federal criminal law in a way probably in conflict with applicable decisions of this Court.

After a long discussion of circumstantial evidence and corroboration (R. 3271-3274), the District Court's initial instructions to the jury continued with the following two paragraphs:

> "Now, the Government says that the affair was carried on with great secrecy so as to escape possible detection, and that no one else was present when the alleged acts took place. The Government, however, urges that facts and circumstances have been proved which, it says, fully substantiate the testimony of Mr. Chambers. This is an issue to be determined by you.
>
> If, as to either count, you do not believe Mr. Chambers or if you do believe Mr. Chambers but do not find such corroborating evidence, you must return a verdict of not guilty on that count." (R. 3274)

The first of these paragraphs, stating emphatically the Government's contention regarding corroboration and wholly ignoring the defense contentions, was even in the initial instructions unduly weighted against petitioner (see *Allison* v. *United States,* 160 U. S. 203, 212).

The case having been submitted to the jury at 3:10 P. M. on Friday, January 20, and the jury having deliberated until 10:45 P. M. and resumed its deliberations at 10 o'clock the following morning (p. 4, *supra*), at 10:45 o'clock the jury sent to the Court the following communication:

> "Your Honor, without reading the entire charge, will you please define the following: reasonable doubt; circumstantial evidence, acceptable corroborative evidence and their relation to each other." (R. 3288)

The Court thereupon read to the jury portions of the initial instructions (R. 3288-3291), concluding the reading with the first two sentences of the first paragraph quoted above, omitting the last sentence of that paragraph ("This is an issue to be determined by you") and all of the following paragraph, and thus leaving as the last words spoken by the Court to the jury before they returned their verdict the emphatic statement: "The Government, however, urges that facts and circumstances have been proved which, it says, fully substantiate the testimony of Mr. Chambers" (R. 3291).

As soon as counsel for petitioner had compared the supplemental instructions with the original instructions, a copy of which he had not had at the time of the reading, he requested the Court to recall the jury and read to them the omitted matter referred to above (R. 3292).* The Court having denied the request, petitioner excepted (R. 3292-3293).

The Court of Appeals, making no specific reference to the District Court's supplemental instructions (see R. 3922), denied petitioner's claim of prejudicial error.

The fact that the jury had been unable for so long to reach agreement emphasized the obligation of the Court to assist them in a dispassionate and informed attempt to come to agreement. The circumstances of this case tending to prejudice petitioner (see pp. 25-26, *supra*) required particular care to avoid further prejudice at this critical time. The last paragraph read by the Court to the jury was not part of the definition of corroborating evidence: and it was definition alone that the jury had requested. Going beyond the request, the Court left with the jury, as his final word, a one-sided argumentative statement of the Government's contention on the vital issue of cor-

* He requested also the reading of other omitted matter, not relevant to the point being argued here.

roboration, a statement which could have had no other effect than to persuade the jury that the Court agreed with the Government. Still worse, the last sentence of the same paragraph as it had been read in the initial instructions, reminding the jury that the issue was to be determined by them, was omitted now (as was the following paragraph instructing the jury that they must acquit unless they both believed Chambers and found corroborating evidence).

This Court has repeatedly expressed its awareness of the vital necessity for scrupulous accuracy and impartiality in a trial court's last words to a jury after long but so far unsuccessful attempt to come to an agreement (*Bollenbach* v. *United States*, 326 U. S. 607; *Burton* v. *United States*, 196 U. S. 283; *Spurr* v. *United States*, 174 U. S. 728). The failure of the Court of Appeals to hold the District Court's action in this case prejudicial error is, we submit, in conflict with those decisions of this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert M. Benjamin,
Harold Rosenwald,
Chester T. Lane,
Kenneth Simon,
Counsel for Petitioner.

January, 1951.

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In the Supreme Court of the United States

October Term, 1950

No. 520

ALGER HISS, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 3902-3922) is reported at 185 F. 2d 822.

JURISDICTION

The judgment of the Court of Appeals was entered on December 7, 1950 (R. 3923), and a petition for rehearing (R. 3925-3940) was denied on January 3, 1951 (R. 3943). The petition for a

writ of certiorari was filed on January 27, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the decision below, upholding the action of the trial court in submitting the issue of petitioner's guilt or innocence of the alleged perjury to the jury, is in conflict with *Weiler* v. *United States,* 323 U.S. 606.

2. Whether the trial court erred in permitting the Government to call William Rosen as a witness, when it was indicated in advance that Rosen would decline to answer relevant questions on the ground that his answers would tend to incriminate him.

3. Whether petitioner was deprived of a fair trial in consequence of misconduct on the part of the prosecutor.

4. Whether the trial court's supplemental instructions were unfair to petitioner.

STATEMENT

On December 15, 1948, an indictment in two counts (R. 2-5) was returned in the United States District Court for the Southern District of New York charging petitioner with perjury, in violation of 18 U.S.C. 1621. Count 1 charged that on December 15, 1948, while testifying before a grand

jury of the Southern District of New York (the same grand jury which returned the indictment), which was investigating possible violations of the espionage and other federal criminal statutes, petitioner falsely testified that neither he, nor his wife in his presence, had ever delivered any documents of the State Department or other government organization, or copies of any such documents, to Whittaker Chambers or any other person not authorized to receive them. Count 2 charged petitioner with having falsely testified on the same day and before the same body that he had never seen Whittaker Chambers after January 1, 1937. Following a trial by jury, petitioner was found guilty on both counts (R. 3294),[1] and was sentenced to five years' imprisonment on each, the terms to run concurrently (R. 3305). On appeal to the Court of Appeals for the Second Circuit, the judgment of conviction was affirmed (R. 3923).

The evidence adduced by the Government may be briefly summarized as follows:

Chambers' testimony.—Whittaker Chambers, the principal prosecution witness, testified that, following several years of duty as a member of the "open" Communist Party of the United States (R. 223-228), he was selected by his superiors, in 1932, "to enter the underground" (R. 227, 228-229). His work in this capacity was to act as a "liaison man" between the American and Soviet

[1] An earlier trial had resulted in a hung jury (R. 3902).

segments of the Party (R. 231-232). In 1934, he was ordered to Washington, D. C., for the purpose of organizing a new "underground" "apparatus" in that city (R. 232-233, 235). Petitioner was at that time a member of a previously established "large underground apparatus in Washington," which had been organized by one Harold Ware (R. 233-234, 235). In June or July of 1934, pursuant to instructions of one J. Peters, "the head of the whole underground of the American Communist Party" and Chambers' immediate superior (R. 233), petitioner was "disconnected from the apparatus" headed by Ware and transferred to the "parallel organization" which Chambers had been commissioned to set up (R. 235). This transfer was arranged at a meeting in a Washington restaurant attended by Peters, Ware, Chambers, and petitioner, at which Chambers met petitioner for the first time (R. 233). Chambers was introduced to petitioner simply as "Carl" (R. 236).

Chambers further testified that, from shortly after his first meeting with petitioner in 1934 until he quit the Communist Party in mid-April 1938, he and petitioner and their wives became close friends (R. 237-238, 240-264). For example, the Chamberses frequently visited the Hisses in the latter's various Washington residences (R. 243, 250, 252), and the Hisses likewise visited the Chamberses in the latter's residences in Baltimore, New York City, and Smithton and New Hope, Pennsylvania

(R. 243-245, 248, 250, 251, 262). The Hisses sometimes helped the Chamberses to move from one residence to another (R. 243-245). The two families took long trips together (R. 277-279). When the Hisses moved from their furnished apartment on 28th Street in Washington to a house on P Street in April 1935, about two months prior to the expiration of their 28th Street lease, they permitted the Chamberses to live in the 28th Street apartment, rent-free, for the duration of the lease period (R. 242; see Gov. Ex. 3, R. 3310). The Chamberses subsequently lived with the Hisses in the latter's P Street house, also rent-free, for a period of from several days to a week, during which time Mrs. Chambers painted a portrait of petitioner's stepson, Timothy Hobson (R. 248, 250). In addition, petitioner permitted Chambers to use an old Ford roadster belonging to him, before he disposed of it in 1936 (R. 246; Gov. Ex. 49, R. 3378), and subsequently loaned Chambers $400 with which to purchase a car of his own (R. 263-264).

After petitioner transferred, in April 1935, from his position as assistant general counsel of the Agricultural Adjustment Administration, Department of Agriculture, to that of counsel to the Nye Committee of the Senate, which was at that time conducting an investigation of the munitions industry (see R. 1809-1812), he told Chambers, the latter further testified, that he "had the oppor-

tunity of using his position in the Nye investigation to obtain confidential documents from the State Department dealing with some angle of the Munitions Investigation" and asked Chambers whether he should procure and deliver them to him (R. 239). Chambers, after consulting Peters, told petitioner to do so (R. 239). Petitioner accordingly procured such documents and delivered them to Chambers, who made photographic copies of them in petitioner's house on P Street (R. 250), later returning the documents to petitioner (R. 239).

Petitioner transferred to the Department of Justice in August 1935, and remained there until September 1, 1936, when he entered the State Department as Assistant to Assistant Secretary of State Francis B. Sayre (R. 1814-1817). In the fall of 1936, Chambers testified, he told petitioner that a man whom he identified as "Colonel Bykov," another "underground worker in a Soviet apparatus," desired petitioner to "turn over documents to the apparatus" (R. 253). In January 1937, petitioner, Chambers, and Bykov met in New York City (R. 254-256). Shortly prior to this meeting, Chambers had given petitioner an Oriental rug, purchased with money supplied by Bykov, as "a gift from the Soviet people in recognition of the work of the American Communists" (R. 254-255). At the meeting in New York, Bykov told petitioner that "the Soviet Union was acutely endangered

by the rise of the Fascist powers; that it needed help, and that Mr. Hiss could greatly help if he would procure documents from the State Department" (R. 256). Petitioner agreed to comply with Bykov's request (*ibid.*).

Very shortly thereafter, Chambers continued, petitioner commenced supplying Chambers with official State Department documents (R. 257). At first, Chambers would call at petitioner's home every week or ten days and receive from him "the papers that * * * Mr. Hiss had on his desk that day or a selection therefrom," which papers petitioner had taken from his office to his home "at the end of his day's work" for that purpose (R. 257-258). Chambers would "take them to Baltimore where they were photographed," and return the documents to petitioner late in the evening of the same day (R. 258, 277). The "film" would subsequently be delivered by Chambers to Bykov (R. 259). This practice continued "until the middle of 1937" (R. 258).

Thereafter, Chambers further testified, a new technique was devised in order to speed up the flow of documents (R. 258-259). Chambers told petitioner that "we wished to have the papers brought out every night, or approximately every night and some of them typed as nearly verbatim as possible and some of them paraphrased" (R. 258). Petitioner agreed to the new proposal (*ibid.*). It was also agreed among Chambers, peti-

tioner, and Mrs. Hiss that the typing entailed by the new procedure would be done by Mrs. Hiss, who could thereby satisfy a desire to perform "some activity for herself" in the "underground work" (R. 290, 259). Accordingly, Chambers thereafter "received not just the documents from a single day, but typed documents which covered the approximate periods I have mentioned—a week or ten days or so, plus the documents for the single day on which the whole mass of documents was transmitted to me" (R. 258-259). "The typed documents, plus the original documents" would then be delivered by Chambers to one Inslerman, who would photograph them in Baltimore; Inslerman would then redeliver the documents, together with the film, to Chambers, who would transmit the film to Bykov, return the "original documents" to petitioner, and burn the "typed documents" (R. 259, 276). In addition to the original documents and the typed copies, petitioner would give Chambers, "from time to time," "small handwritten notes * * * about documents which had passed under his eyes quickly and which, for some other reason he was unable to bring out and which he thought were of some importance" (R. 259). These notes, or photographs of them, were likewise turned over by Chambers to Bykov (R. 259).

The above-described practice continued, Chambers further testified, until he "broke with the Communist Party in April 1938" (R. 259-260, 264).

However, he "saved" some of the typed copies of documents, handwritten notes, and film, which he had accumulated shortly before his break from the Party, and delivered them in an envelope to his wife's nephew, one Levine, in New York (R. 260). They remained in Levine's custody until late 1948, when Chambers procured them from Levine for use in a libel action instituted by petitioner against Chambers (R. 290-292).

Corroborating evidence.—The principal evidence corroborating Chambers' testimony consists of the physical typewritten copies of documents, handwritten notes, and film, referred to in the preceding paragraph, which Chambers "saved" from the mass of like materials which he had, for about a year, been turning over to Colonel Bykov.

Government Exhibits 11 and 12 (R. 300, 3319) are two rolls of developed microfilm. The Government's "Baltimore"[2] Exhibits 48 and 50-55 (R. 3521-3533) are legible enlargements of these two rolls (R. 300-301). The Government's "State" Exhibits 48 and 50-55 (R. 3631-3645) are the "underlying" State Department documents, i.e., the original official State Department documents of which the correspondingly numbered "Baltimore" Exhibits are photographic reproductions. They

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[2] So called because they were originally received in evidence in connection with the libel suit instituted by petitioner against Chambers in the United States District Court for the District of Maryland, at Baltimore, in September 1948 (see R. 298, 290-293, 2448).

bear dates occurring in November and December 1937, and January 1938.

The Government's "Baltimore" Exhibits 1-4 (R. 3433-3440) are four handwritten memoranda, which petitioner conceded at the trial were in his handwriting (R. 1073; see also Pet. 4-5). They consist of summaries of the contents of four cablegrams which came to the State Department in January and March 1938. The Government's "State" Exhibits 1-4 (R. 3535-3542) are the "underlying" State Department documents, i.e., the four cablegrams themselves.

The Government's "Baltimore" Exhibits 5-9 and 11-47 (R. 3441-3444, 3447-3520) consist of 43 typewritten pages, each of which, as petitioner concedes, "is either a copy of or excerpt from, or a summary or paraphrase of all or part of, one or more official State Department documents" (Pet. 5). The Government's "State" Exhibits 5-9 and 11-47 (R. 3543-3546, 3549-3630) are the "underlying" State Department documents, which bear dates indicating that they were received or prepared in the State Department between January 5 and April 1, 1938. Petitioner concedes that all but one of these "underlying" documents were distributed to his office, among others, in the State Department.[3] The Government established at the trial (R. 1074-1075) and petitioner concedes (Pet.

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[3] See pp. 20-23 of his brief in the Court of Appeals, a copy of which he has filed in this Court (Pet. 6).

5) that all 43 of these typewritten copies of State Department documents were typed on a certain Woodstock typewriter (Def. Ex. UUU, R. 1559, 3799), which was in the possession of petitioner and his wife at least as late as December 29, 1937, the date on which they moved from their 30th Street residence to Volta Place (R. 2350-2351; Gov. Ex. 3, R. 3310). And there was ample evidence from which the jury could have found that the Hisses did not dispose of this typewriter until April 1938 or some time subsequent thereto.[4]

In addition to the above-summarized corroborating evidence of a documentary nature, the Gov-

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[4] A summary of this evidence would unduly lengthen this brief in opposition. Nor is there any need to set it forth. The Court of Appeals stated in its opinion that "According to the testimony of appellant and his wife, that typewriter had been given to one of their servants and taken away from their home before the dates of any of the documents of which Mr. Chambers produced copies, but there was sufficient contradictory evidence, other than that of Mr. Chambers, to enable the jury to find that the typewriter was in the Hiss home during the time when the documents might have been copied on it" (R. 3914). Petitioner does not challenge this finding, but, on the contrary, concedes that "The Woodstock typewriter was (even on the Government's evidence) given by petitioner and his wife to the Catlett boys, sons of their maid, by mid-April, 1938, at the latest" (Pet. 10). It is petitioner's theory that Chambers himself "obtained the typewriter from the Catletts' house for a few days without risk of detection" (Pet. 10)—a speculative hypothesis devoid of evidential support—and typed the documents in question on it for the purpose of fabricating evidence against petitioner for possible future use, and for undisclosed motives (Pet. 10-11).

ernment produced witnesses (other than Chambers) who contradicted petitioner's testimony in material particulars, thereby justifying the jury in refusing to give credence to petitioner's denials on the ultimate issues, i.e., those framed in the indictment.

For example, Hede Massing, who belonged to a Communist Party "apparatus" in Washington, D. C., in 1935 (R. 1262), testified to a friendly quarrel between her and petitioner in that year, arising from an attempt by her to induce one Noel Field to leave petitioner's "apparatus" and join hers; either she or petitioner, Mrs. Massing testified, remarked at the end of their conversation that "Whoever is going to win we are working for the same boss" (R. 1264-1266). Petitioner denied at the trial that he had ever been a Communist or been sympathetic with Communism (R. 1867), and also denied ever having met or seen Mrs. Massing (R. 1897-1901).

One other instance of direct contradiction of testimony given by petitioner is worthy of mention. Petitioner testified on direct examination that he had never been in any house occupied by the Chamberses (R. 1853), and again, on cross-examination, he emphatically denied ever having visited the Chamberses in Baltimore (R. 2039). Petitioner's wife similarly denied ever having visited Mrs. Chambers in Baltimore (R. 2381). But Edith Murray, a former maid of the Chamberses,

testified that she had seen both petitioner and his wife in the Chamberses' Eutaw Place home in Baltimore in 1935 or 1936, the former once, and the latter about four times, one of these times being the occasion when petitioner was there (R. 3024-3027, 3032).[5]

ARGUMENT

1. The Court of Appeals, after briefly reviewing Chambers' testimony and the corroborating evidence adduced by the Government (R. 3913-3916), concluded that "there was independent evidence sufficient as a matter of law, if believed and so considered by the jury, to substantiate the testimony of Mr. Chambers in compliance with the rule in perjury cases as to both counts" (R. 3916). Petitioner contends that this holding, in so far as count 1 of the indictment is concerned, is in conflict with *Weiler* v. *United States,* 323 U.S. 606 (Pet. 16-19). The contention is insubstantial. The decision below is in entire accord with the *Weiler* decision.

The *Weiler* decision stands for two propositions. First, it reaffirmed the ancient rule that, in a pros-

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[5] See also the testimony of Mrs. Chambers (R. 954-1071), which substantially corroborated the testimony of her husband in a wealth of details relating to the general friendly relationship which existed between the Chamberses and the Hisses from 1934 to 1938. Her testimony, by the same token, contradicted the testimony of petitioner with respect to the nature of this relationship in the large areas in which the two versions differed.

ecution for perjury, "the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment" (323 U.S. at 607), i.e., that "The Government must establish the falsity of the statement alleged to have been made by the defendant under oath, by the testimony of two independent witnesses or one witness and corroborating circumstances" (*id.* at 607, 608-610). Secondly, it rejected the holding of the lower court in that case that "it is solely the function of the judge finally to determine whether a single witness and sufficient corroborative evidence have been presented to sustain a conviction" (*id.* at 610). In respect of the latter aspect of its decision, the Court continued (*id.* at 610-611):

> Two elements must enter into a determination that corroborative evidence is sufficient: (1) that the evidence, if true, substantiates the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement; (2) that the corroborative evidence is trustworthy. To resolve this latter question is to determine the credibility of the corroborative testimony, a function which belongs exclusively to the jury. Thus, to permit the judge finally to pass upon this question would enable a jury to convict on the evidence of a single witness, even though it believed, contrary to the belief of the trial judge, that the

> corroborative testimony was wholly untrustworthy. Such a result would defeat the very purpose of the rule, which is to bar a jury from convicting for perjury on the uncorroborated oath of a single witness. It is the duty of the trial judge, when properly requested, to instruct the jury on this aspect of its function, in order that it may reach a verdict in the exercise of an informed judgment. * * *

In the case at bar, the trial judge carefully instructed the jury as to their duty to determine whether "there is other trustworthy evidence which substantiates" Chambers' testimony as to each count of the indictment (R. 3272-3274). The judge even went further and told them that they "must believe beyond a reasonable doubt that the corroborative testimony is inconsistent with the innocence of the defendant" (R. 3274). This latter instruction was clearly more favorable to petitioner than the *Weiler* decision requires, since that decision does not suggest that the corroborative evidence, standing alone, must be such as to exclude every reasonable hypothesis of innocence, but merely that it must "substantiate" the testimony of the witness.[6] The corroborative evidence

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[6] Compare VII Wigmore, Evidence, (3d ed., 1940), § 2042, pp. 278-279: "As to the *nature of the corroboration*, no detailed rule seems to have been laid down, nor ought to be laid down. The jury should be instructed not to convict unless the testimony of the principal witness has been so corroborated that they believe it to be true beyond a reasonable doubt." (Italics in original.)

reviewed in the Statement, *supra,* pp. 9-13, was plainly adequate as a matter of law to justify submission of the case to the jury. It was not the duty of the trial judge, as petitioner seems to suggest (Pet. 17, 18), or of the Court of Appeals, to indulge in fanciful speculating (see Pet. 10-11) in an effort to reconcile the corroborative evidence with some conceivable hypothesis of innocence, for that would have been to usurp the function of the jury. Cf. *Glasser* v. *United States,* 315 U.S. 60, 80; *Curley* v *United States,* 160 F. 2d 229, 232-233 (C.A. D.C.), certiorari denied, 331 U.S. 837.

2. Petitioner contends that it was prejudicial error for the trial court to permit the Government to call William Rosen as a witness, knowing he would claim his privilege against self-incrimination (Pet. 19-23). The contention is without merit. The facts relating to this issue are as follows:

In the course of his testimony outlining the close, friendly relationship which existed between him and petitioner during the period from 1934 to 1938, Chambers testified that during the early days of that period petitioner owned an old Ford roadster (R. 246), this being the car which petitioner occasionally permitted him to use (*supra* p. 5); and that thereafter petitioner, having acquired a new Plymouth (R. 245-246), "wished to get rid of the old roadster" (R. 247). He told Chambers, the latter testified, that he "proposed

to turn the car over to the open Communist Party for the use of some poor organizer" (R. 247). Chambers opposed the idea, he testified, but subsequently "Mr. Hiss brought up the question again," as a result of which Chambers "took it up with J. Peters" (*ibid.*). Following his discussion of the matter with Peters, Chambers continued, he told petitioner that "Peters had agreed, although reluctantly, to have it turned over to the open party" (*ibid.*). Thereafter, Chambers further testified, "Mr. Hiss told me that he had turned the car over according to an arrangement between him and Peters" (*ibid.*).

Government Exhibit 49 (R. 773, 3378) is the certificate of title of the Ford roadster above referred to. It shows an "assignment of title" by petitioner to the Cherner Motor Company of Washington, D. C., dated July 23, 1936. Both the notarized signature of the assignor and the name and address of the assignee are concededly in petitioner's handwriting (R. 1865-1866). The same page of this document contains, immediately beneath the assignment from petitioner to the Cherner Motor Company, a reassignment, bearing the same date, by the Cherner Motor Company to William Rosen, together with Rosen's application for a new certificate of title. The signature of the representative of the Cherner Motor Company, Samuel A. Mensh, vice-president of the company (R. 775), was genuine (R. 777), but a search of the company's only

extant records of its transactions in 1936—its invoices—disclosed that they contained no record of this particular transaction, and, further, that none of those records for that period were missing (R. 776-777, 782, 785).

The Government indicated to the court that it proposed to call Rosen as a witness for the purpose of asking him "whether he was affiliated in any way with the Communist Party, and what he had to do with this automobile, if anything; whether he had any connection at all with Mr. Chambers, Mr. Peters or Mr. Hiss" (R. 860). At a conference in the trial judge's chambers (R. 859-861), defense counsel objected to the calling of Rosen on the ground that he had previously "claimed a privilege against self-incrimination before the grand jury, was held in contempt by Judge Rifkind, appealed to the Circuit Court of Appeals for this circuit where the conviction of contempt was reversed and his privilege was sustained" (R. 859);[7] that counsel for Rosen had recently advised defense counsel that he, Rosen, if called as a witness at the trial, would again "claim the privilege with respect to any questions pertaining to his membership in the Communist Party and with respect to any questions pertaining to his transaction involving the Ford car which at one time belonged to Mr. Hiss" (*ibid.*); and that it would be prejudicial to peti-

[7] See *United States* v. *Rosen*, 174 F. 2d 187 (C. A. 2), certiorari denied, 338 U. S. 851.

tioner for Rosen to claim his privilege in the respects mentioned in the presence of the jury (R. 859-861, 922). Counsel for the Government conceded that Rosen himself, if present at the conference in chambers, would state that he intended to claim his privilege if called as a witness at the trial, but advised the judge that he nevertheless wished to call Rosen as a witness and question him along the lines above indicated (R. 860). The trial judge ruled that Rosen might be called (R. 924).

Rosen was accordingly called as a prosecution witness (R. 922-925). Asked whether he had been in any way connected with the Communist Party in 1936 (R. 922), whether he was the William Rosen whose name appeared on the above-described certificate of title as assignee of a Ford automobile from the Cherner Motor Company (R. 923), and whether he had ever owned "a Ford automobile known as a 1929 roadster" (*ibid.*), he declined to answer on the ground that his answers would tend to incriminate him. He did testify, however, that he knew no one by the name of "J. Peters" in 1936 (R. 923), and also that he had not known petitioner either at that time or at any time subsequent thereto (R. 924). The trial judge sustained Rosen's claims of privilege (R. 924), and admonished the jury that they were "to draw no inference unfavorable to this defendant because of the fact that this witness Rosen has claimed immu-

nity" (R. 925). This admonition was repeated in his instructions to the jury (R. 3267).

We submit that the Government was fully justified in calling Rosen as a witness under the circumstances above outlined, and that the ruling of the court permitting him to be called was proper. The credibility of the prosecution's chief witness, Chambers, was, of course, of vital moment in the trial of this case. It was, in fact, the most sharply disputed issue at the trial. If the Government had not been permitted to call Rosen as a witness, his non-appearance would have left a troubling gap, in the jurors' eyes, in the Government's case against petitioner. Chambers had testified that petitioner had indicated to him that he proposed to turn his old Ford roadster over to "the open Communist Party for the use of some poor organizer," and that petitioner later told Chambers that he had done so (*supra,* pp. 16-17). Petitioner had previously testified before the House Committee on Un-American Activities that he had given this car to Chambers himself, whom he knew as George Crosley, as part of a sublease transaction whereby he sublet his 28th Street apartment to Chambers and "threw in" the car as part of the deal (R. 1990-1996). It was, of course, reasonable for the prosecution to suppose that petitioner would repeat this testimony at the trial, as in fact he did (R. 1851-1852, 2002, 2025). The question of how petitioner did in fact dispose of the roadster was thus vitally

relevant to the issue of whether it was Chambers or petitioner who was lying. The certificate of title to the automobile in question showed that petitioner had assigned the car in 1936 to a well-known Ford dealer in Washington, and that the dealer had, on the same day, reassigned it to William Rosen (*supra,* p. 17).

In the absence of any evidence as to who Rosen was, whether or not he was affiliated in any way with the Communist Party at the time of the assignment of title to him, etc., the jury would plainly have had no way of knowing whether Rosen's receipt of the car tended to corroborate or impeach Chambers' version of how petitioner had disposed of it. They would thus have been left in the dark on this sharply disputed issue. Failure by the Government to call Rosen would have entailed the danger, from the prosecution's point of view, that the jury might infer that the Government feared to call Rosen because his testimony, at best, would be non-corroborative of Chambers, or, at worst, would tend positively to impeach Chambers' veracity. Indeed, there was the obvious danger that the defense would seek to capitalize on a failure to call Rosen by inviting the jury to infer that his testimony could not have helped, and would probably have hurt, the Government's case. This precise tactic, it should be noted, was in fact employed by the defense in the case of other persons whose

names figured at the trial but who did not appear as witnesses.[8]

For the foregoing reasons, it was a proper exercise of discretion for the trial judge to permit the prosecution to call Rosen and interrogate him with reference to the automobile transaction in question and his membership *vel non* in the Communist Party at the relevant time, even though it was indicated that Rosen would decline to answer the pertinent questions. The procedure adopted was the only one which could have adequately protected the Government's rights under the circumstances. And the judge was careful, at the same time, to protect petitioner's rights by instructing the jury that they should draw no inference adverse to petitioner from Rosen's claim of privilege.[9] The

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[8] See R. 3105 and 3122-3123 where the defense, in its summation to the jury, vigorously argued that the Government's failure to call Bykov, Peters, and Silverman—the latter being the go-between between Chambers and petitioner, according to Chambers, in the delivery of the Oriental rug to petitioner, see p. 6, *supra* (R. 254-255)—showed weaknesses in the Government's proof. Thus, the defense argued: "Where is Bykov? Or Peters? You did not see him take the chair. You heard absolutely no explanation as to why Bykov did not take the stand" (R. 3105). Again: "Where is Silverman? Did the Government bring him on? There is a link missing in the chain, a very important one * * *" (R. 3122).

[9] "Nor may any inference be drawn from the fact that a witness refused to answer questions on the ground that the answers might incriminate him. The reluctance of a witness to incriminate himself may not be used to incriminate another. The situation is just as though the questions which the witness refused to answer had never been asked" (R. 3267). The

judge's solution of the problem presented by the Rosen question was thus the only possible one that could fairly and adequately protect both the Government's and petitioner's rights in the peculiar circumstances presented.

3. Petitioner next contends that he was deprived of a fair trial in consequence of misconduct on the part of the prosecutor (Pet. 24-35). His canvassing of the record of the trial, which lasted from November 18, 1949 (R. 163), to January 20, 1950 (R. 3213), and covers over 3,000 printed pages, has turned up eight instances of alleged misconduct which he deems of sufficient importance to warrant specific mention. In our view, the mere reading of petitioner's versions of most of these instances (Pet. 26-34) suffices to demonstrate the insubstantiality of his present contention. Any attempt to reply in detail to each specific charge of misconduct would unduly lengthen this brief in opposition. Furthermore, there is plainly no need to do so, since, with but one exception (to which we shall advert in a moment), as petitioner candidly concedes (Pet. 34), his counsel "took no ob-

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jury were similarly admonished at the time of Rosen's appearance on the stand (R. 925).

Petitioner is in error in stating that "the prosecutor flouted the court's ruling that no inference was to be drawn by the jury from Rosen's claim of privilege by asking the jury to draw the inference that he was a Communist" (Pet. 22). The prosecutor, in his sole reference to Rosen in his summation, made no such appeal (R. 3228).

jection on the record with respect to the matters" now assigned as misconduct. The rule is too well settled to require the citation of supporting authority that a defendant cannot, after the return of an adverse verdict, complain for the first time on appeal of alleged trial errors, or instances of alleged misconduct on the part of the prosecutor, or both, which he evidently believed were of so little moment at the time of their occurrence that he made no objection.[10]

The one exception to which we referred, above, relates to the testimony of Edith Murray. It is claimed that the prosecutor was guilty of misconduct in calling Mrs. Murray as a rebuttal witness, rather than putting her on the stand as part of the Government's case in chief (Pet. 31-32). The contention is plainly without substance. The purpose of Mrs. Murray's testimony was to prove that both petitioner and his wife had been in the Chamberses' Eutaw Place home in Baltimore in the fall of 1935 or spring of 1936 (R. 3024-3027; Pet. 31). It is evident that this testimony had no direct rele-

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[10] It is true, of course, that "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Atkinson*, 297 U. S. 157, 160. But petitioner suggests no reason, and we know of none, why any of the claimed instances of prejudicial misconduct should be considered as falling in this "exceptional" category.

vance to the charge contained in either count of the indictment. (The second count (R. 4) charged petitioner with perjuring himself in denying that he had ever seen Chambers after January 1, *1937*). Her testimony might very well have been out of place, therefore, as part of the prosecution's case in chief. It was only after petitioner testified at the trial that he had *never* been in any home of the Chamberses in Baltimore that Mrs. Murray's testimony became strictly relevant. For, if petitioner admitted at the trial being in the Eutaw Place residence of the Chamberses in 1935 or 1936, Mrs. Murray's testimony would not have reflected in any way on his veracity. Consequently, the prosecutor, in calling Mrs. Murray as a rebuttal witness, far from being guilty of "misconduct," was merely following the normal procedure at a criminal trial, since it was not until after the defendant's case had closed that her testimony became logically relevant.[11]

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[11] It should be remarked that the defense apparently thought so little of its present contention at the time of trial that it permitted two days to elapse after Mrs. Murray testified before registering any objection to her appearance as a rebuttal witness. Mrs. Murray testified on January 17,1950 (see R. 3005, 3023). The objection to her being called as a rebuttal witness—made in the form of a motion to strike her testimony (R. 3177)—was not made until January 19, 1950 (see R. 3089). In the interim,two other rebuttal witnesses (R.3058-3083) and a defense surrebuttal witness (R. 3085-3088) testified, and the defense's summation to the jury was concluded (R. 3091-3175).

4. Finally, petitioner contends that the trial court committed prejudicial error in its supplemental instructions to the jury (Pet. 36-38). This contention is also without merit.

The court's main instructions to the jury appear at R. 3263-3276. Petitioner does not challenge them. After the jury had retired to consider a verdict, they sent the following communication to the judge: "Your Honor, without reading the entire charge, will you please define the following: reasonable doubt; circumstantial evidence, acceptable corroborative evidence and their relation to each other" (R. 3288). The judge proceeded to do so, reading, *verbatim,* the relevant passages of his instructions as requested (R. 3288-3291). In reading (R. 3290-3291) the passages dealing with corroborative evidence (R. 3273-3274) the judge ended his reading with the following sentences (R. 3274, 3291):

> Now, the Government says that the affair was carried on with great secrecy so as to escape possible detection, and that no one else was present when the alleged acts took place. The Government, however, urges that facts and circumstances have been proved which, it says, fully substantiate the testimony of Mr. Chambers.

He then asked the jury, "Does that answer your question?" (R. 3291), to which the forelady re-

plied, "Yes. your Honor, thank you" (*ibid.*). The jury thereupon retired, the reporter indicating that the time was 10:55 a.m. (*ibid.*).

Thirty minutes later, counsel for petitioner complained to the judge that he should have read more of his original instructions than he did, and asked the judge to recall the jury and read to them certain omitted passages, which he proceeded to indicate (R. 3292-3293). The judge declined to do so, stating that he had fully covered the matters about which the jury had inquired (*ibid.*).

The only omitted passage of which petitioner now complains is the following, which appears, in the original instructions, immediately after the above-quoted excerpt with which the rereading from the instructions on corroborative evidence was concluded (R. 3274):

> * * * This is an issue to be determined by you. If, as to either count, you do not believe Mr. Chambers or if you do believe Mr. Chambers but do not find such corroborating evidence, you must return a verdict of not guilty on that count.

Petitioner claims that, owing to the omission of this passage, the judge "left with the jury, as his final word, a one-sided argumentative statement of the Government's contention on the vital issue of corroboration, a statement which could have had no other effect than to persuade the jury that the

Court agreed with the Government. Still worse, the last sentence of the same paragraph as it had been read in the initial instructions, reminding the jury that the issue was to be determined by them, was omitted now (as was the following paragraph instructing the jury that they must acquit unless they both believed Chambers and found corroborating evidence)" (Pet. 37-38). These complaints are insubstantial for the following reasons:

First, there is no basis whatever for the charge that, by concluding his rereading of the original instructions on corroborative evidence at the point where he did, the judge indicated to the jury that he "agreed with the Government." The matters mentioned in the concluding portion of the reread instructions were properly introduced by the explanatory phrases "*The Government* says * * *," "*The Government* * * * urges * * *." A jury must be credited with sufficient acumen to be able to distinguish between a contention of the prosecution and a belief of the judge.

Secondly, the substance of the above-quoted passage whose omission on the rereading is complained of was already fully and carefully covered in those pertinent passages of the original instructions which were reread (see R. 3288-3291). Thus, the passages which were reread contained numerous references to the Government's duty to prove its case beyond a reasonable doubt and to the requirement that the jury must both believe Cham-

bers and find that his testimony was corroborated by other evidence. Indeed, in the paragraph immediately preceding that with respect to which petitioner complains, they repeated the charge (which, as we have seen, *supra,* p. 15, was more favorable to petitioner than necessary), that the jury "must believe beyond a reasonable doubt that the corroborative testimony is inconsistent with the innocence of the defendant" (R. 3291).

Thirdly, it is important to note that the matter now complained of was not brought to the attention of the judge immediately, while the jury were still present, but was first raised thirty minutes after the jury had again retired. It seems clear from what has already been said that the judge could properly determine that the importance of those two sentences did not warrant recalling the jury from their deliberations.[12]

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[12] Petitioner explains his failure to call the court's attention immediately to the omission by referring to a note of the reporter that at the time of the rereading to the jury of the requested portions of the original charge, "no copy of the original charge had been given to or was in the possession of the defendant or his counsel" (R. 3292; and see Pet. 37). This statement does not indicate, and there is no present claim, that a copy would not have been furnished counsel had he requested it.

CONCLUSION

The judgment below is correct, and no conflict of decisions or question of general importance is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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February, 1951.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 520

ALGER HISS,
Petitioner,

against

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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Without undertaking detailed reply to the Government's brief in opposition to the issuance of the writ, we believe that brief comment on some of the statements and arguments therein will be useful to this Court.

Weiler v. United States

The Government's brief (13-16) emphasizes the holding in *Weiler* that a trial judge may not finally determine that alleged corroborative evidence *is* sufficient. But that, we submit, in no way touches our argument that the trial judge (and appellate courts) must determine, on a motion for judgment of acquittal, whether as a matter of law alleged corroborative evidence *is not* sufficient.

As to the standard of sufficiency: The statement quoted from Wigmore (Br. 15 fn. 6) is subject to the comments, first, that it was pre-*Weiler* and, second, that Wigmore's whole treatment of the subject shows his lack of sympathy with the two-witness rule in perjury cases. Indeed it is clear that the Wigmore standard, for which the Government appears to contend, would leave nothing of substance to the historic two-witness rule. Standards of proof in other cases (Br. 16), especially conspiracy cases, cannot be determinative of the standard for corroboration in a perjury case. In any event, if there is uncertainty as to the proper interpretation of the *Weiler* decision in this regard, there is presented a question of first importance which should be decided by this Court.

The witness Rosen

In stating (Br. 21) that:

> "In the absence of any evidence as to who Rosen was, whether or not he was affiliated in any way with the Communist Party at the time of the assignment of title to him, etc., the jury would plainly have had no way of knowing whether Rosen's receipt of the car tended to corroborate or impeach Chambers' version of how petitioner had disposed of it",

the Government in effect concedes that the purpose of inducing Rosen's claim of privilege before the jury, by calling him to the stand knowing that he would claim his privilege, was to supply by inference from the claim of privilege the lack of evidence that Rosen was a Communist, etc. Thus the Government even now insists upon the permissibility of the forbidden inference.

At the same time, the Government argues that we were in error in saying that the prosecutor asked the jury to draw that inference (Br. 23, last paragraph of footnote). The Government is in error. We quote from the prosecutor's summation (R. 3228):

"Then Mr. Chambers said he had a Ford and that he used to use it; then he said he remembered that Mr. Hiss wanted to give it away to the Communist Party so some poor worker could use it. Well, what happened with that? . . . it ends up with Rosen.

"Now, does that corroborate what Mr. Chambers says? 'He had a Ford; he wanted to give it to the CP; he asked me; I asked Peters; he was opposed to it; finally we said "All right, go ahead if you want to do it." We don't know what happened to it.'

"You saw what happened to it. Corroboration: . . . Ford, disposition of the Ford."

The Government refers (Br. 21) to

". . . the obvious danger that the defense would seek to capitalize on a failure to call Rosen by inviting the jury to infer that his testimony could not have helped, and would probably have hurt, the Government's case."

The charge that defense counsel might, if their objection to the calling of Rosen had been upheld, have argued to the jury from his non-appearance as a witness is wholly unjustified. If, without justification, such extreme impropriety is to be attributed to the defense, it must still be recognized that the trial judge would have stopped short any such attempted double-dealing.

The rebuttal witness Edith Murray

The Government argues (Br. 25) that Mrs. Murray's testimony "might very well have been out of place . . . as part of the prosecution's case in chief."

The argument is unfounded. A great part of the prosecution's case in chief consisted (without defense objection) of testimony bearing on the issue of alleged close association between the Chamberses and the Hisses in years prior to January 1, 1937 (Pet. 7). Much of this testimony (by Chambers and Mrs. Chambers) is, indeed, referred to in the Government's brief at pages 4-5 and 13 (fn. 5). Both Chambers and Mrs. Chambers testified on the prosecution's case in chief to, among other things, alleged visits of the

Hisses to the Chamberses' Eutaw Place residence (*e.g.*, R. 250, 963-965), to which Mrs. Murray's testimony related.

This being the theory on which the case was tried, the District Court was clearly right in stating that Mrs. Murray's testimony "might more properly have been offered in the direct case" (Pet. 32).

The trial court's instructions to the jury

The Government says (Br. 26) that "Petitioner does not challenge" the trial court's main instructions to the jury. The statement is incorrect. Petitioner has not advanced error in the trial court's instructions as one of the grounds for granting a writ of certiorari; but the petition specifically notes petitioner's wish to reserve that point for argument if the writ is granted (Pet. 15-16). Moreover, as to the particular paragraph of the supplemental instructions discussed in the petition, the petition specifically notes that this paragraph "was even in the initial instructions unduly weighted against petitioner" (Pet. 36).

Since here and elsewhere in its brief the Government argues that the initial instructions on corroboration were more favorable to petitioner than petitioner was entitled to (Br. 15, 28-29), we think it proper to note that petitioner would, if permitted on the writ being granted, argue in this Court, as he did below (brief in Court of Appeals 119-121), that the trial court's initial instructions on the law of corroboration were inadequate to give to the jury any practical guidance in their deliberations and were weighted against petitioner.

Respectfully submitted,

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March, 1951.